

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CAROL STEPIEN, an individual,

Plaintiff,

V.

RICK SPINRAD, Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator; National Oceanic and Atmospheric Administration (NOAA), an Agency of the United States,

Defendants.

No.

Complaint Re Freedom of Information Act, 5 U.S.C. § 552

I. INTRODUCTION

This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking the release of records unlawfully withheld by NOAA related to the employment of former, NOAA Employee, Carol Stepien. Ms. Stepien has sought records several times from NOAA over the past 12 months with little to no responsive document produced by NOAA. NOAA has not yet provided *any* substantive response, nor has NOAA told Ms. Stepien to modify or clarify her request.

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and under 28 U.S.C. § 1331, because this action arises under the laws of the United States, including FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201. Venue is proper in this court under 5 U.S.C. § 552(a)(4)(B), as the FOIA Request

DECLARATION OF NOLAN LIM IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT - 1

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1 was issued from Stepien stemming from her employment at NOAA while she was in Seattle,
 2 WA.

3 2. Because NOAA failed to respond to the FOIA Request with a statement of whether
 4 they will comply or not, or even to notify Stepien of how much additional time to produce
 5 documents would be needed within 20 business days of her respective request, no administrative
 6 appeal is required under 5 U.S.C. § 552(a)(6)(c)

7 **III. Statutory Background:**

8 3. FOIA requires agencies to “make available to the public information.” 5 U.S.C. §
 9 552(a). Any information subject to FOIA must be disclosed. “[E]ach agency, upon any request
 10 for records . . . shall make the records promptly available to any person.” Id. § 552(a)(3).

11 4. “[U]pon any request for records made under [§ 552(a)](1), (2), or (3),” an agency
 12 has 20 business days to determine whether to comply. Id. § 552(a)(6)(A). NARA’s FOIA
 13 regulations also require a response within 20 days or notification to the requester that
 14 “complicating factors” prevent NARA from making a decision within 20 working days.
 15 36 C.F.R. § 1250.26.

16 5. An agency may only withhold documents that fall within one of the enumerated
 17 exemptions from FOIA. If an agency withholds documents, it must provide a
 18 “*Vaughn* Index” that adequately identifies the specific documents withheld. *See*
 19 *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). “A withholding agency must
 20 describe *each* document or portion thereof withheld, and for *each* withholding it must
 21 discuss the consequences of disclosing the sought-after information.” *King v. U.S.*
 22 *Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)
 23 (emphasis in original); *see also Wiener v. FBI*, 943 F.2d 972, 978 (9th Cir. 1991)

1 (requiring a *Vaughn* Index and finding it inadequate); *Andrus v. United States Dep't*
 2 *of Energy*, 200 F. Supp. 3d 1093, 1105 (D. Idaho 2016) (same)

3 6. A court may review an agency's decision to withhold documents, and "the burden

4
 5 is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). An agency cannot justify
 6 its withholding by offering nothing more than "[c]onclusory and generalized allegations."
 7 *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976). When
 8 the agency fails to sustain its burden, the court may "order the production of any agency
 9 records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

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 11 **IV. Facts**

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 13 **A. Plaintiff's FOIA Request**

14 7. On November 17, 2020, (Agency Request #2021-00298) Plaintiff through her
 15 attorney requested records of the following documents:

16 a. All documents and correspondence to or from Michelle McClure from March 1,
 17 2020 to March 31, 2021 referencing "high turnover", turnover rates, or employee
 18 resignations within the National Oceanic and
 19 Atmospheric Administration (NOAA) Pacific Marine Environmental Lab
 20 (PMEL).
 21 b. All records of employees who resigned from PMEL from 2019 to 2020 and the
 22 documents reflecting the reasons
 23 c. for their resignations.
 24 d. All resignation letter(s) authored and sent by Dr. Christopher Paight within
 25 PMEL.
 26 e. All documents, records, notes, memoranda, and correspondence, including
 27 documents from external investigators provided to NOAA staff, regarding
 investigations conducted in PMEL during 2020.

1 f. All documents containing, correspondence referencing, and records of complaints
2 made by PMEL staff regarding Dr. Carol Stepien during 2020.

3 g. All documents, records, notes, memoranda, and correspondence regarding a 955
4 investigation initiated by Michelle McClure involving James Guyton and Dr.
5 Carol Stepien.

6 8. On December 8, 2020, Plaintiff made the following FOIA request (Agency Request
7 #2021-000401) to Defendant:

8 i. To clarify, I request all communications about me, as the subject,
9 email and written between Michelle McClure and Karolyn Turcotte,
10 between March 2019 and present. I further request all
11 communications, email and written, between Michelle McClure and
12 Christopher (Chris) Paight from June 2019 through present,
13 particularly his May 2020 resignation letter.

14 9. On January 4, 2021, Plaintiff made a request (Agency Request # 2021-000652) for
15 additional documents in the form below:

16 a. I request a copy of the investigation report and all notes and interviews
17 conducted by Kirk Essmyer and Steven Goodman, made against me
18 conducted at the request of Dr. Michelle McClure, initiated May 2020 through
19 present.

20

21 10. On March 22, 2021, Plaintiff's attorney, submitted a spreadsheet to Agency FOIA
22 Liaison, Karen Robin, confirming that Ms. Stepien was still seeking records that are
23 mentioned in the above paragraphs 7-9.

24 11. On April 8, 2021, Ms. Robin wrote an email to Plaintiff's attorney stating that "search
25 efforts" were underway for responsive documents and that "not all responsive
26 documents maybe releasable in full under the FOIA."

27

1 12. As of August 20, 2021, NOAA has not provided any documents responsive to the
2 requests outlined in paragraphs 7-8 above.

3 13. NOAA has not responded to Stepien nor her attorney about whether they intend fully
4 comply or not with the FOIA requests they made on November 7, 2020, and
5 December 8, 2020, January 4, 2021,

6 **V. Causes of Action**

7 **First Cause of Action - Violation of the Freedom of Information Act – Failure to**
8 **Respond 5 U.S.C §§ 552(a)(3), (a)(4)(B)**

9 14. Plaintiff realleges and incorporates by reference each of the allegations set forth
10 in the preceding paragraphs.

11 15. NOAA violated FOIA by failing to respond to each of the above the above FOIA
12 Request for records within 20 business days indicating whether they would comply or
13 not.

14 **Second Cause of Action - Violation of the Freedom of Information Act – Failure to**
15 **Respond 5 U.S.C §§ 552(a)(3), (a)(4)(B)**

16 16. Plaintiff realleges and incorporates by reference each of the allegations set forth
17 in the preceding paragraphs.

18 17. NOAA further violated FOIA by failing to promptly provide records, or reasonably
19 segregable portions of lawfully exempt responsive records, in response to the AGO's
20 request for records.

21 **VIII. PRAYER FOR RELIEF**

22 Plaintiff respectfully requests that this Court:

23 18. Declare that NOAA violated FOIA by failing to make a determination on the
24 FOIA Request within the time period prescribed by law;

25 19. Declare that NOAA violated FOIA by failing to promptly provide all responsive

- 1 20. Declare that NOAA waived its right to request fees for processing the Plaintiff's
- 2 request by failing to respond timely to the request;
- 3 21. Order NOAA to provide a determination on the FOIA Request, at no cost to the
- 4 Plaintiff;
- 5 22. Order NOAA to conduct searches reasonably calculated to locate the requested
- 6 records, and release all records responsive to the FOIA Request within twenty days of
- 7 this Court's order, at no cost to Plaintiff;
- 8 23. Enjoin NOAA from withholding agency records and order the production of all
- 9 agency records improperly withheld from Plaintiff;
- 10 24. Retain jurisdiction over this action to ensure the processing of the FOIA Request
- 11 is in compliance with FOIA and any orders of this Court;
- 12 25. Award Plaintiff its costs of litigation, including reasonable attorney fees as
- 13 provided by FOIA, and any other applicable provision of law; and
- 14 26. Grant such other relief as the Court may deem just and proper.

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19 DATED this August 27, 2021, at Seattle, Washington.

20 By: *s/Nolan Lim*

21 _____
22 Nolan Lim
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